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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]16

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, DECEASED, and NATIONAL SURETY CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No. .....

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, Deceased, and NATIONAL SURETY CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, deceased, and NATIONAL SURETY CORP., by their attorneys, respectfully petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 13, 1963.

PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Court of Appeals of September 13, 1963, is reported at 322 F. 2d 317 and also is appended hereto (P. App. p. 16). On the basis of that opinion the United States Court of Appeals for the Third Circuit entered a judgment reversing the judgment of the United States District Court for the District of New Jersey in favor of the defendants and remanding the case with a direction to enter judgment in favor of the United States of America (P. App. p. 28). The District Court opinion is reported at 208 F. Supp. 697 and also is set forth in appellant's brief (App. 11a).

The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1). The judgment of the United States Court of Appeals for the Third Circuit was entered on September 13, 1963. On October 25, 1963 The United States Court of Appeals For The Third Circuit ordered that issuance of the mandate in this case be stayed until December 13, 1963.

Question Presented.

1. May a distributing agent or his surety be held liable under the provisions of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191, and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, for the payment of a claim of the United States of America where the said agent has disbursed all of the funds coming into his possession pursuant to order of the court?

The Statutes Involved.

Section 64, Chapter VII, of the Bankruptcy Act, 11 U. S. C. sec. 104, provides in pertinent part:

> "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (5) debts owing to any person, including the United States of America, who by the laws of the United States of America is entitled to priority, * * * "

Section 337, Chapter XI, of the Bankruptcy Act, 11 U. S. C. sec. 737, provides in pertinent part:

> "*Same; conduct and business after acceptance of arrangement.*
>
> At such meeting, or in any adjournment therof, the judge or referee shall, after the acceptance of the arrangement—
>
> (1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court in such amount as the court shall fix; and fix the amount or rate of such person's compensation not in excess of the compensation allowable to a receiver under this title."

* * * * * *

Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 provide:

> "SECTION 191. *Priority Established.*
>
> Whenever any person indebted to the United States is insolvent, or whenever the estate of any

deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

"SECTION 192. *Liability of Fiduciaries.*

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Statement of the Case.

This suit was brought by the United States of America against the distributing agent in bankruptcy of a corporation, and his surety, to subject the agent to personal liability pursuant to Rev. Stat. sec. 3466, 31 U. S. C. sec. 192 for his alleged failure to honor the government's debt priority under Rev. Stat. sec. 3467, 31 U. S. C. sec. 191. The United States District Court for the District of New Jersey had jurisdiction of the subject matter under 28 U. S. C. sec. 1345.

1. The Background of the Case.

On October 1, 1946, the Seeley Tube and Box Company, Inc., a New Jersey corporation, filed a petition in the Dis-

trict Court for an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. sec. 701, *et seq.* (App. 12a). With the petition, the debtor filed a statement of executory contracts, including a number of government contracts with the Picatinny Arsenal (App. 12a-13a). A few days later, the United States gave notice to the debtor of its intention to terminate two of these contracts because of the debtor's default in performance, and, on November 18 and 19, 1946, they were terminated (App. 13a). The Government reserved its right to hold the debtor liable for any damages that might result from the re-letting of the contracts (App. 13a).

On February 28, 1947, the debtor filed an amended plan of arrangement which provided for the payment in full of all unsecured debts (App. 13a). On March 17, a referee in bankruptcy appointed George Stewart King to be distributing agent, pursuant to 11 U. S. C. sec. 737(1), *supra*, at p. 3, his duties thereunder being to distribute a fund of $160,193.68 to be deposited by the debtor (App. 12a; 10a). The National Surety Corporation gave bond in the amount of $10,000.00 for the faithful performance by King of his duties (App. 12a). On March 21, 1952, the bond was reduced to $4,000.00 by court order (App. 12a).

A hearing on the confirmation of the amended plan of arrangement was held by the referee on March 21, 1947. The plan contained no written provision as to the Government's claim, which was not yet liquidated (App 13a). However, during the hearing, the counsel for the debtor remarked that there might be an outstanding claim, amounting to perhaps $20,000.00, with respect to the Picatinny Arsenal contracts (App. 13a). In discussion with the referee, he asserted that "the debtor company will deposit any sum of money that is represented by any claim that

the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it" and, further, that "we have $94,000.00 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000.00 or more available to dispose of that claim, in cash" (App. 13a-14a). The referee then entered an order confirming the plan of arrangement and directing King to carry it out as follows (App. 13a; 10a-11a):

> "2. G. Stewart King, as distributing agent of debtor be, and he is hereby authorized, directed and empowered to distribute the moneys deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court;"

On April 14, 1947, an order was entered directing the United States of America to file its claim on or before May 9, 1947, (App. 15a). On May 9, 1947, the United States of America filed its preliminary contingent proof of claim in the amount of $26,818.82. The aforesaid claim alleged that the United States of America was a priority creditor (App. 15a).

Between March 21, 1947, the date of hearing, and May 9, 1947, the distributing agent had, in accordance with his orders received on March 21, 1947, and in accordance with orders and arrangement sheets also received by him on March 21, 1947, signed and sent to the referee for countersigning and transmittal, checks disbursing all but $6,085.01 of the money deposited with him (App. 15a). Each check had been issued pursuant to a court order and was countersigned by the referee in bankruptcy (App. 15a). The

$6,085.01 was subsequently distributed as follows (App. 15a):

United States of America	$3,620.39
Creditors having a priority to United States of America	1,057.55
Creditors not having a priority	1,407.07
	$6,085.01

On March 30, 1949, the Government amended its claim to $34,125.03 (App. 15a). The referee ruled, on December 8, 1953, that the claim of the Government had been timely filed for purposes of the Bankruptcy Act, a ruling which was reversed by the District Court on review, *In re Seeley Tube and Box Company*, 120 F. Supp. 269 (D. N. J. 1954) (App. 15a). On appeal, the United States Court of Appeals for the Third Circuit reinstated the referee's decision holding that:

> "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was therefor in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." *In re Seeley Tube and Box Company*, 219 F. 2d 389, at 391 (3d Cir. 1955), *cert. denied*, 350 U. S. 821, (1955).

On August 2, 1956, the bankruptcy court entered an order approving King's final report and account, discharging him of his trust, and also cancelling the surety's bond (App. 16a).

2. Proceedings Below

The instant suit was brought by the United States against King and his surety company on the ground that

King was subjected to personal liability by Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, *supra*, p. 4, because he had failed to make payment to the Government as a priority creditor, as required by Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 *supra*, pgs. 3 & 4. On King's death, his widow, as executrix of his estate, was substituted as party defendant (App. 11a).

The District Court dismissed the Government's complaint, holding that King, as a distributing agent in bankruptcy, was not within the class of persons subjected to liability by 31 U. S. C. sec. 192, *United States* v. *King* 208 F. Supp. 697 (D. N. J., 1962). The Court of Appeals reversed this decision by an opinion and order filed September 13, 1963 (P. App.).

Reasons Urged for Granting Writ.

1. The Court of Appeals in extending the scope of Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, to hold liable for the Government's priority claims a distributing agent who followed explicitly the orders of the court, has ruled contrary to the case of *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953), where a receiver who followed the orders of the court was held not liable for payments made ahead of the Government's priority claims.

2. The Court of Appeals was in error in interpreting the provisions of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, to hold liable for the Government's priority claims a mere agent, appointed by the Court to distribute pursuant to the Order of the Court, where such agent followed his orders precisely and payments were made ahead of the Government's priority claims.

I.

Conflict between the 5th Circuit and the 3rd Circuit.

The Court of Appeals should follow the decision of *United States* v. *Stephens* 208 F. 2d 105 (5th Cir. 1953).

In *United States* v. *Stephens, Ibid*, a receiver appointed by a state court for an insolvent corporation followed schedules and orders of the court and as a result the debtor's fund had been exhausted by paying other creditors in advance of satisfying priority claims due to the United States. The United States commenced suit under Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 to hold the receiver personally liable for the debt, but the District Court dismissed the complaint on the ground that sec. 192 is not applicable to court appointed receivers, *United States* v. *Stephens* (Not reported). The dismissal of the complaint was affirmed on appeal, *United States* v. *Stephens,* 208 F. 2d 103 (5th Cir. 1953). The Court of Appeals pointed out that sec. 192 does not specifically refer to a receiver in its enumeration of certain fiduciaries by title and construed the words "or other person" as being "limited to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying person as one who pays in whole or in part any *debt due by the person or estate for whom or for which he acts.*" *United States* v. *Stephens, Id* at p. 108. (Emphasis in original). The court asserted that the defendant as a receiver was an officer or arm of the court acting for the court rather than for the debtor. It concluded that the defendant was not within the purview of sec. 192, and that the suit was properly dismissed.

There are no other cases which have come to counsel's attention in which a receiver or distributing agent who followed explicitly the orders of the court has been held individually liable under sec. 192. There is one case, the case of *United States* v. *Crocker*, 313 F. 2d 946 (9th Cir. 1963), where a receiver acting without court authorization or approval was held liable. The fact that the receiver in *Crocker* was acting without the approval of the court is specifically referred to in the lower court's opinion, *United States* v. *Crocker*, 194 F. Supp. 860, at 861 (D. Nev. 1961). Thus the holding in *United States* v. *Crocker* is really no more than a case in line with the holding in *In Re J. B. Pollak Co., Inc.*, 86 F. 2d. 99 (2d Cir. 1936), where a distributing agent was held liable to creditors when payments were made without proper order, resulting in a depletion of the fund so that creditors claims could not be satisfied. The court in both those cases properly held the individual liable because he was no longer acting as an agent of the court but was on his own initiative taking on a responsibility and acting in the same manner as might an "executor, administrator or assignee." He was not acting strictly as an arm of the court.

In *United States* v. *Sachs*. 217 F. Supp. 545 (D. Md., 1963) a receiver was also held liable for disregarding the right of priority of the government in distributing the assets of an insolvent corporation. The opinion does not state whether the court ordered this distribution, whether there was a disregard of a contrary order, or whether no order was made. It would seem probable from the court's language and from the fact that a proof of claim had been filed by the government prior to any distribution that the distribution was either made without an order of court or in contravention of such order.

II.

Interpretation of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192.

A distributing agent appointed pursuant to sec. 337, Chapter XI of the Bankruptcy Act, 11 U. S. C. 737, *supra*, p. 3, who follows the orders of the court in the distribution of a debtor's assets should not be subjected to liability under the above statutes where payments were made ahead of a priority claim of the government.

The distributing agent herein was appointed by the court concurrently with the deposit by the debtor corporation of a sum sufficient to consummate its plan of arrangement with unsecured creditors. Since the debtor had remained in possession, some functionary was necessary to act as the arm of the court in the preparation of the necessary dividend checks as directed by the court. The defendant, King, was not directed to inquire into the affairs of the debtor to determine what priority claims existed nor was any provision made to compensate him for so doing. He was appointed to act as an arm of the court in carrying out the provisions of 11 U. S. C. sec. 737. He was ordered to perform the following duty (App. 10a):

> "* * * the said distributing agent being hereby directed on receipt of such consideration to deposit said funds in an account to be opened in any qualified bankruptcy depository in this district, subject to the control and order of this Court."

Thereafter, upon confirmation, he was further ordered as follows (App. 10a-11a):

> "G. Stewart King, as distributing agent of debtor be and he is hereby authorized, directed and empow-

> ered to distribute the moneys deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court."

Subsequently, orders for distribution were made by the court giving the name of each person to whom distribution was to be made together with the amount of such distribution.

Thus the distributing agent's function was purely a ministerial one. His sole discretion was in the selection of a "qualified bankruptcy depository in this district." It cannot be denied that in the instant case the defendant, King, faithfully carried out the order of the court. It is a matter of record that the defendant accounted to the court and was discharged of his trust (App. 16a). In fact, the charge directed at the defendant, King, is that he did carry out the orders of the court and that his obedience to these orders renders him liable to the United States of America.

The law is clear that a ministerial officer may not act in any manner other than in compliance with the orders of the court, *Stearns, Suretyship*, sec. 9.27, p. 341 (5th Ed. 1951). The rule applies to a special commissioner:

> "And the failure of a special commissioner to pay out funds as directed by the Circuit Court may render him liable on his bond." 9 *Appleman, Insurance Law and Practice* sec. 5445, p. 297 (1943), citing *State* v. *United States Fidelity & Guaranty Co.*, 81 W. Va. 184, 94 S. E. 123 (Sup. Ct. W. Va. 1917).

and to a receiver:

> "Since a receiver is considered to be an officer of the court, his obedience to court orders has been

> held to be enforceable by contempt proceedings, or by an action on his bond, or both." 9 ***Appleman, supra***, at sec. 5479, p. 376.

The same rule applies to a distributing agent:

> "In making distribution such agent [distributing] was entitled to rely upon copies of the dividend sheets annexed to the duly certified copy of the Order of Confirmation furnished to him by the Referee in charge, but if he abused his powers or was faithless to his trust, he could become personally liable to those entitled to share in the funds." 9 ***Remington, Bankruptcy Law***, sec. 3598, p. 238 citing ***In Re Empire Shoe Corporation***, 16 F. Supp. 713, (D. N. Y. 1936).

In the case of *In Re Empire Shoe Corporation*, *Ibid*, the court held that the depository acting as distributing agent was absolutely entitled to rely on the certified copy of schedules furnished by the referee and that a priority creditor who was overlooked by those schedules should not be allowed to recover against the distributing agent. The court said at page 715, "It would be unfair to hold it [the distributing agent] financially responsible for mistakes of others."

In the case at bar the court below has placed emphasis on the fact that Mr. King was the president of the debtor corporation and well knew or should have known of the unresolved claim of the United States. No negligence of misfeasance of any kind on King's part was ever proven or attempted to be proven by the Government, although it had every opportunity to do so. No effort has ever been made by the Government to establish that Mr. Freeman, counsel for the debtor corporation, was not utterly truthful when he made his statement regarding the corporation's

ability to pay (App. 13a-14a) and was not acting in perfect good faith. The Government did not seek to have Mr. Freeman brought into court to establish the guilt or negligence of Mr. King, although it could easily have done so.

Mr. King was acting under strict and binding orders which gave him no freedom of action and absolutely no discretion except perhaps the choice of which bank to use to deposit money in. His title, distributing agent, in itself implies a complete lack of power to act on his own. He was in no sense a distributing or paying person such as is implied in sec. 192 by the words "any other person." The person who distributed or paid in the case at bar was the court itself. Mr. King should no more be charged with responsibility here for the Government's loss than should the private in the Army for the loss of a battle when he has done precisely what he was told.

Conclusion.

Because the decision in the court below is directly contrary to the holding in *United States v. Stephens*, 208 F. 2d 105 (5th Cir. 1953), and because the court below has erroneously interpreted the provisions of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191, and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 to hold liable for a priority claim of the Govern-

ment a mere distributing agent when such agent has followed strictly the orders of the court, the writ should issue.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,297

UNITED STATES OF AMERICA,

Appellant,

v.

ELIZABETH SIMONSON KING, Executrix of the Estate of George Stewart King, Deceased, and National Surety Corp., a corporation of the State of New York.

Appeal from the United States District Court for the District of New Jersey

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Argued June 3, 1963

Before BIGGS, Chief Judge, and MCLAUGHLIN and GANEY, Circuit Judges.

Opinion of the Court.

(Filed Sept. 13, 1963)

By BIGGS, Chief Judge.

This is an appeal from a judgment dismissing the complaint of the United States on the ground that the evidence fails to support the cause of action alleged.

The action was brought by the United States against the executrix of George S. King,[1] a distributing agent for the Seeley Tube and Box Company, a bankrupt in a Chapter XI proceeding, and against National Surety Corporation, the surety on King's bond. The complaint alleges that the United States has a debt entitled to priority pursuant to 11 U.S.C.A. § 104 and Rev. Stat. § 3466, 31 U.S.C.A. § 191[2], against Seeley's assets, that King, as Seeley's distributing agent, paid Seely's other creditors before attempting to satisfy the priority claim in favor of the United States, and that as a result the bankrupt's assets were depleted so as to prevent full payment to the United States of its claim. The complaint further alleges that King, or his surety to the extent of the bond, is personally liable to the United States for the unpaid portion of the claim under Rev. Stat. § 3467, 31 U.S.C.A. § 192[3].

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[1] King died testate after the commencement of the suit at bar, and his executrix was substituted as a party defendant in his stead pursuant to an order of the court entered on June 15, 1959.

An action by the United States against a fiduciary under Rev. Stat. § 3467, 31 U.S.C.A. § 192 does not abate and survives against his executrix. See United States v. Dewey, 39 Fed. 251 (C.C.S.D. N. Y. 1889).

[2] Section 191 of 31 U.S.C.A. provides as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[3] Section 104 of 11 U.S.C.A. provides in pertinent part: "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (5) debts owing to any person, including the United States, who by the laws of the United States is [sic] entitled to priority. . . ."

Section 192 of 31 U.S.C.A. provides as follows: "Every executor, administrator, or assignee, or other person, who pays, in

The stipulated facts, as found below by the court below are as follows: On October 1, 1946, Seeley filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 701 *et seq.* King, the president of the debtor corporation, was appointed distributing agent[4] by an order of the referee filed on March 22, 1947, and he filed a bond in the amount of $10,000 underwritten by the defendant surety company. King's duties were to receive a fund of $160,193.68 deposited by Seeley, deposit the fund in an account subject to the control of the bankruptcy court, and to distribute the fund by checks drawn by him and countersigned by the referee in accordance with orders of distribution to be made by the referee.

A hearing on an amended plan of arrangement was held on March 21, 1947. The plan did not contain any "written provisions" for payment of the claim of the United States. However, during the course of the hearing counsel for Seeley admitted that the United States might have a claim as a result of terminated executory contracts between Seeley and Picatinny Arsenal, an installation of the War Department at Dover, New Jersey. Seeley's counsel further stated that $94,000 would be available to pay the Government's claim and that "there will be at all times $20,000 or more available to dispose of that claim, in cash." On April 14, 1947, the referee entered an order directing the United States to file its claim on or before May 9, 1947.

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whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

[4] Section 737 of 11 U.S.C.A. provides in pertinent part: "[T]he judge or referee shall, after the acceptance of the arrangement—(1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court. . . ."

On that due date, May 9, 1947, the United States filed a preliminary contingent proof of its claim in the amount of $26,818.82 and alleged that it was a priority creditor. However, during the time between the hearing on March 21, 1947 and the date on which the Government filed its claim, May 9, 1947, King, in his capacity as distributing agent, had paid out all but $6,085.01 of the fund deposited with him[5] to other creditors of Seeley. Each check drawn by King for these other creditors had been issued pursuant to specific court orders and had been countersigned by the referee.

On March 30, 1949, the United States amended its claim of May 9, 1947 to $34,125.03, the final allowed amount of the claim. Of the $6,085.01 remaining of the fund in the hands of King, $3,620.39 was paid to the United States and the balance to other creditors.

On December 8, 1953, the referee determined that the claim of the United States had been filed in time and that the amended plan of arrangement had been confirmed upon the condition as had been stated by Seeley's counsel, that there would be an adequate sum available to satisfy the claim of the United States. The United States District Court for the District of New Jersey reversed the decision of the referee. In re Seely Tube & Box Co., 120 F. Supp. 269 (D. N. J. 1954). This court reversed the district court and held that "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was . . . in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." In the Matter of Seeley Tube & Box Co., 219 F. 2d 389, 391 (3 Cir. 1955), *cert. denied*, 350 U.S. 821 (1955).

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[5] King deposited the fund received by him from Seeley with the West Side Trust Company of Newark, New Jersey, and had it credited to his account as distributing agent for Seeley. See King's final petition and report, filed May 3, 1956, attached to the complaint of the United States as exhibit "A".

On August 2, 1956, the referee approved King's final report and accounting and discharged both King and the surety. The final amount outstanding on the claim in favor of the United States was $25,831.08 after allowance of proper deductions and credits.

On July 3, 1958, the United States commenced the suit at bar against King's executrix for the sum of $25,831.08, the balance outstanding on the claim, and against the surety for $10,000, the amount of its bond. The case was submitted to the district court below, sitting without a jury, upon the stipulated facts. The complaint was dismissed by an order entered on October 8, 1962. In its opinion[6] the court held that 31 U.S.C.A. § 192 did not apply to a distributing agent, and as King's executrix could not, therefore, be liable, the surety must be exonerated as well.

It is the position of the United States on this appeal that King, as distributing agent, is within the class of persons on whom personal liability is imposed by 31 U.S.C.A. § 192 to the extent of a priority claim due the United States where such person exhausts or partially exhausts the debtor's fund by paying other creditors before the United States. The pertinent statute, 31 U.S.C.A. § 192, is as follows: "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It appears therefore that the question for our determination is whether a distributing agent in a Chapter XI proceeding is an "executor, administrator, or assignee, or other person," within the meaning of the statute quoted.

Sections 191 and 192 of 31 U.S.C.A. must be interpreted *in pari materia*, as parts of a "common statutory

[6] United States v. King, 208 F. Supp. 697 (D.N.J. 1962).

scheme." United States *v.* Crocker, 313 F. 2d 946, 947 (9 Cir. 1963). See United States *v.* Butterworth-Judson Corp. 269 U. S. 504, 513 (1926). See also United States *v.* Lutz, 295 F. 2d 736, 742 (5 Cir. 1961): "The statutes [§§ 191 and 192] have an historical relation to the early efforts of the founding fathers to make this country a union and not a confederation of states. The precursor of Section 191 was enacted in 1797 to give the government a priority in the recovery of its debts from insolvent persons. When that section was reenacted in 1799 the forerunner of Section 192 was passed as a companion measure. This coincidence of enactment raises an inference that the two provisions should be read together as parts of a single legislative plan. The inference is confirmed by consideration of the operation and effect of Section 192. Construed in conjunction with Section 191, . . . the section promotes obedience to the requirement of Section 191 that government debts be given priority when a corporation is insolvent, and it protects the government's interest when that requirement is violated. It accomplishes this without overshooting the coverage of Section 191 and without burdening business operations except in cases of insolvency, when the government is in danger of being unable to collect its debts. It imposes the danger of personal liability on the corporate officers only at times when because of the shortage in funds they should be alert to the necessity for paying debts according to their priorities."

Taken together, then, Sections 191 and 192 impose two requirements both of which must be met if the United States is to prevail in an action such as that at bar. First, the debt owing to the United States must be one afforded priority under Section 191. Secondly, the fiduciary sought to be held personally liable for the debt under Section 192 must be either an "executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United

States from such person or estate. . . ." See United States *v.* Crocker, *supra* at 947-948. See also Bramwell *v.* United States Fid. & Guar. Co., 269 U. S. 483, 490 (1926).[7]

That the debt owing from Seeley to the United States is one afforded priority under Section 191 is an issue that requires no extended discussion for the debt is clearly one within the list enumerated in that section. The fact that the United States did not formally file its claim or proof of claim at the hearing on the amended plan of arrangement does not alter the debt's priority status, nor can this factor alter the fiduciary's liability under Section 192. United States *v.* Kaplan, 74 F. 2d 664 (2 Cir. 1935).

The second of these two requirements, that is, that the fiduciary sought to be held personally liable for the debt be one within the net of liability cast by Section 192, does not admit of a short answer. We have been unable to find any direct authority on this point where the fiduciary involved is, as in the case at bar, a distributing agent. In two cases involving a somewhat analogous fiduciary, a receiver, conflicting results were reached by two courts of appeals.

In United States *v.* Stephens, 208 F. 2d 105 (5 Cir. 1953), a receiver appointed by a state court for an insolvent corporation had exhausted the debtor's fund by paying other creditors in advance of satisfying priority claims due to the United States. The United States commenced suit under Section 192 to hold the receiver personally liable for the debt, but the district court dismissed the complaint on the ground that Section 192 is not applicable to court-appointed receivers. The dismissal of the complaint was affirmed on appeal. The court of appeals pointed out that Section 192 does not specifically refer to a receiver in its enumeration of certain fiduciaries by

[7] The fiduciary must, in addition, have notice of the claim in favor of the United States before making the distribution to the other creditors. Want v. Commissioner, 280 F. 2d 777 (2 Cir. 1960).

title, and construed the additional, albeit somewhat vague, designation "or other person" as being "limited to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying 'person' as one 'who pays in whole or in part any debt *due by the person or estate for whom or for which he acts.*'" United States *v.* Stephens, *supra* at 108. (Emphasis in original). The court, asserting that a receiver is an officer or arm of a court acting for and under a court rather than for the debtor, concluded that a receiver is not within the purview of Section 192.[8]

In United States *v.* Crocker, *supra*, the Court of Appeals for the Ninth Circuit arrived at a different result than that reached by the Fifth Circuit in the Stephens case, *supra*, on similar facts. In Crocker, a receiver appointed by a state court took possession of the debtor's assets and distributed the proceeds of the sale of the assets to other creditors although the receiver knew of the existence of a priority claim in favor of the United States. The complaint filed by the United States against the receiver, alleging personal liability under Section 192, was dismissed by the district court.[9] The Court of Appeals reversed. In a thorough and comprehensive opinion by Judge Browning, the court held that Sections 191 and 192, read together, impose personal liability upon the person to whom control of a debtor's assets has passed after a divestment of the kind specified in Section 191 where such person has knowingly failed to pay a priority debt owing from the debtor to the United States. The court pointed out that the scope of Section 192 is not

[8] The Stephens decision is criticized in 67 Harv. L. Rev. 1274 (1954).

[9] It should be noted that the district court in the case at bar cited the decision of the district court in Crocker, 194 F. Supp. 860 (D. Nev. 1961), in its opinion. The subsequent reversal of that decision by the Ninth Circuit, filed February 15, 1963, was, of course, not available to the court below at the time its opinion was prepared.

limited to those classes of fiduciaries specifically enumerated in it, and cited several cases in which fiduciaries outside the statutory enumeration were held personally liable, as, for example, a trustee in bankruptcy.[10] The court in Crocker did not accept the position taken in Stephens, *supra,* that Section 192 must be construed to encompass only those fiduciaries standing in a personal relationship to the debtor as his or its representative and that, therefore, a receiver, as a representative of the court rather than the debtor, could not be within the scope of the statute. Instead, the court in Crocker asserted: "[T]he debts paid by a liquidating receiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase 'for whom or for which he acts' should be read as a general acknowledgement of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191. In terms of the purpose of the two sections, the significant characteristic which persons in the classes named in Section 191 [*sic* § 192] have in common is not that they represent debtors rather than courts, but rather that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations . . . [A]ny 'other person' who answers this description is included in Section 192, if the debtor is insolvent." United States *v.* Crocker, *supra* at 949.

The decisions in Stevens and Crocker, *supra,* are helpful but they cannot be deemed to be determinative of the issue presented by this appeal. The appellees here lay emphasis on the fact that in Crocker the receiver was empowered to operate the debtor's business and did so for about two years. The business was then sold by him and he distributed the proceeds of the sale to creditors other than the United States, albeit he knew of the priority claim

[10] United States v. Kaplan, 74 F. 2d 664 (2 Cir. 1935).

asserted by the United States. According to the allegations of the complaint, which had to be taken as true, neither the sale of the assets nor the distribution was authorized or approved by the state court. See 194 F. Supp. 860, 861 (D. Nev. 1961). There can be no question that the receiver in Crocker had actual and effective control over the assets of the debtor. In fact, he exercised more control than that ordinarily permitted by law. He had the ability to pay out and did in fact pay out the proceeds to creditors.

The appellees also emphasize the decision in Bramwell *v.* United States Fid. & Guar. Co., *supra* at 490, in which the Supreme Court construed Sections 191 and 192 to impose personal liability for a priority debt due the United States "when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent. . . ." In Bramwell the monies belonging to an Indian tribe had been placed in an Oregon bank and the bank had been placed in the exclusive position and control of the State Superintendent of Banks to be administered according to the Oregon law under which the State Superintendent of Banks performed the functions of assignee, receiver or trustee for the liquidation of the debts of the insolvent bank. Here, of course, the measure of control in the assignee was indeed large for the liquidator, apparently, could make distribution without reference to a court order. The appellees point out that in United States *v.* Crocker, *supra* at 949, the Court of Appeals for the Ninth Circuit stated that "the significant characteristic which persons in the classes named in Section 191 [*sic* § 192] have in common is . . . that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations." The appellees assert that the distributing agent was nothing more than an "amanuensis", "A person whose employment is to write from dictation, or to copy what another has written; a secretary." See Webster's International Dictionary.

It is the position of the appellees that once the distribution had been established by the orders of the bankruptcy court that precise distribution became immutable, and the distributing agent, King, was bound thereon and was compelled to make distribution according to the distribution sheets or stand in contempt of the bankruptcy court. But the duties of the distributing agent in performing the final function of distribution of a debtor's estate to creditors are not different in any substantial way from those imposed on a receiver in equity, a receiver in bankruptcy, or a trustee in bankruptcy acting under the order of the court which appointed him. Changes in distribution can be effected upon timely application to the court. Negligence is apparent in the situation at bar. Moreover, in the case at bar it should be noted that King was not only the distributing agent but that prior to the Chapter XI proceeding, King was the president of the debtor corporation and well knew or should have known of the unresolved claim of the United States. Indeed, as we have pointed out at an earlier point in this opinion, Seeley's counsel stated that there would be available at all times $20,000 or more to dispose of the claim of the United States "in cash". Putting it plainly, we do not think that the equities here weigh very heavily in favor of King.

We point out also that Section 192 is a very old statute. It was derived from the Act of March 2, 1799, 1 Stat. 676, and was designed for one purpose only, to aid in the collection of sums due the United States. It will be observed that the statute is exact in its terms and provides that "Every executor, administrator or assignee or other person . . . who pays . . . any debt due by the . . . estate for . . . which he acts before he . . . pays the debts due the United States from such . . . estate shall become answerable in his own person and estate", for the debt due the United States. There is nothing in the statute as to the "control" of the fund by the disbursing individual. The

critical phrase is a very uncomplex one; it is simply he "who pays". It is a statute intended by Congress as a final backstop for the protection of the federal fisc. We conclude that King is personally liable. See Field *v.* United State, 34 U.S. (9 Pet.) 182 (1834); United States *v.* Barnes, 31 Fed. 705, 707 (C.C.S.D. N.Y. 1887). See also United States *v.* Weisburne, 48 F. Supp. 393, 397 (E.D. Pa. 1943).

In reaching this conclusion we are not unmindful that the appellees have asserted a doctrine of estoppel against the United States. In this connection we need say only that estoppel is not available as a defense against the United States.

The judgment of the court below will be reversed. The case will be remanded with the direction to enter judgment in favor of the United States in accordance with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 8, 1962 in this case be, and the same is hereby reversed and the cause remanded with the direction to enter judgment in favor of the United States in accordance with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

September 13, 1963.